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I. Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the General Provisions of the Book on Contracts of the Civil Code of the People's Republic of China

On December 5th, the Supreme People's Court issued the "Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the General Provisions of the Book on Contracts of the Civil Code of the People's Republic of China" ("New Judicial Interpretation"). The release of this judicial interpretation likely will have a significant impact on future legal practices. In this article, we will focus on the parts that could be interesting for foreign investors and analyze and interpret them in conjunction with provisions from other aspects.

- **The Possible Limitation on the Autonomy in Arbitration**

Both the Civil Code of the People's Republic of China (the "Civil Code") and the Arbitration Law of the People's Republic of China (the "Arbitration Law") contain provisions on the content of autonomy of will, and autonomy of consciousness is a common principle of both the Civil Code and the Arbitration Law. According to Article 4 of the Arbitration Law, the parties settling disputes by means of arbitration shall reach an arbitration agreement on a mutually voluntary basis and in writing. An arbitration commission shall not accept an application for arbitration submitted by one of the parties in the absence of an arbitration agreement.

Article 36 of the New Judicial Interpretation also clarifies that:(1) a creditor will not be bound by an arbitration agreement entered into by the debtor with a third party in case the creditor wants to enforce claims on behalf of the debtor against such third party; (2) however, if an arbitration has been initiated already between the debtor and the third party before the first hearing of the lawsuit, the creditor might not be able to sue before the people's court anymore and could be bound by the arbitration agreement.

- **Definition of Common Business Practice**

Article 2 of the New Judicial Interpretation explicitly defines the meaning of "common business practice" as "the common practices between the parties in transaction activities, or the practices commonly adopted in the locality or a certain field or industry and known or should be known to the other party when entering into a contract." When interpreting contract terms, Common Business Practice is a necessary consideration when there are no specific agreements reached. It is important to note that while the New Judicial Interpretation clarifies the meaning of Common Business Practice, it also puts the burden of proof on the party asserting these practices."

- Judicial Practice of Standard Clauses

Article 9 of the New Judicial Interpretation provides that "where any term of the contract conforms to Paragraph 1 of Article 496 of the Civil Code, and a party concerned claims that such term is not a standard term only on the ground that the contract is made based on the model text of the contract or both parties have explicitly agreed that such term is not a standard term, the people's court shall not uphold such claim. Where one party engaging in business activities claims that a contract clause prepared by it in advance and not negotiated with the other party is not a standard clause only on the ground that it has not been actually repeatedly used, the People's Court shall not uphold such claim. However, exceptions shall apply where there is evidence that the clause is not prepared in advance for repeated use. "

According to Paragraph 1, Article 496 of Civil Code, a standard clause shall have all of the following three characteristics: firstly, it is pre-drafted; secondly, it is intended for repeated use; and thirdly, it is not consulted with the other party beforehand. Regarding the "repeated use", the New Judicial Interpretation further clarifies that, if a party engaged in business activities claims that a contract clause drafted in advance and not negotiated with the other party is not a standard clause only on the ground that it has not been actually repeatedly used, the people's court shall not support such claim. However, there is an exception if there is evidence proving that the provision is not pre-drafted for the purpose of repeated use. In other words, the criteria for determining " repeated use " do not rely on actual repetition. The parties are not required to prove whether there is actual repetition; as long as the provider of the standard clause has the intention of repetition, regardless of whether it is actually repeated and the frequency of repetition, it can be considered as " repeated use."

- Is an Arbitration Clause Considered a Standard Clause ?

Currently, in judicial practice, there are different rules regarding the validity of arbitration clauses as standard clauses. However, regulatory authorities have increasingly imposed penalties on the use of contract terms that restrict consumer rights.

According to an administrative penalty decision issued by the Beijing Municipal Administration for Market Regulation in 2022, a company in the electric vehicle industry was fined for specifying arbitration as the dispute resolution method in the car purchase agreements provided to consumers. The arbitration venue was set in Guangzhou, and consumers were unable to alter this clause when signing the agreement. The regulatory authority deemed that the company's customers base mainly consisted of consumers in Beijing, and the company, holding a certain advantageous position during

the contract negotiation with consumers, should safeguard the legal rights of consumers. Unfair and unreasonable trading conditions should not be established. Setting the dispute resolution venue in Guangzhou increased the cost and burden of consumer rights protection for consumers in Beijing. This action constituted an attempt to exclude consumers' rights to bring legal action on contract disputes through standard clauses. The Beijing Municipal Administration for Market Regulation issued a warning and imposed a fine on the company for this conduct.

- Abnormal Changes in Transaction Prices as Force Majeure

According to Article 32 of the New Judicial Interpretation, if the price experiences unforeseeable and non-commercial risk fluctuations due to policy adjustments or abnormal changes in market supply and demand, and continuing to fulfill the contract would be significantly unfair to one party after the contract was entered into, the People's Court should recognize a substantial change in the fundamental conditions of the contract, as stipulated in Article 532(1) of the Civil Code."

- Chopping and the Validity of Contracts

Article 22 of the New Judicial Interpretation addresses the relationship between chopping, signing, acting within the authority of the person affixing the chop, and the effectiveness of contracts. It also provides specific provisions on how to determine apparent representation or apparent agency in cases of unauthorized representation or agency. The regulation outlines three situations:

- A. If the person affixing the chop has the authority, but the chop affixed is not a recorded chop or is a forged chop, the contract is valid.
- B. If there is no chop affixed but only a signature or fingerprint, and the person signing or fingerprinting has the authority, the contract is valid unless it is expressly stipulated that affixing a chop is a condition for the formation of the contract.
- C. If no one signs or fingerprints but there is a chop, and the person affixing the chop has the authority, the contract is valid.

- Conclusion

The New Judicial Interpretation, like many of similar legal interpretations published by the PRC Supreme Court, intends to provide specific guidelines for the judicial practices pursuant to the Civil Code. The specific aspects emphasized in this article aim to provide the readers with a glimpse of the many changes involved.

II. Regulation on Supervision and Administration of Non-Bank Payment Institutions

On December 17, the Regulation on Supervision and Administration of Non-Bank Payment Institutions ("the Regulations") as the first administrative regulation in the non-bank payment regulatory field in China, was published by the People's Bank of China and will come into effect on May 1, 2024. The promulgation of this Regulation elevates the regulatory oversight of payment institutions in China to the level of administrative regulations. In this publication, we will briefly introduce some key content of the Regulations.

- Licensed operation and strict access

It is made clear in the Regulations that a non-bank payment institution refers to a limited liability company or a joint stock company (other than a banking financial institution) established in accordance with the laws of the People's Republic of China, which has obtained a payment business license and is engaged in the payment business of transferring monetary funds in accordance with electronic payment instructions submitted by the payee or payer ("the user"). The Regulations provide that the establishment of a non-bank payment institution shall be approved by the People's Bank of China and obtain a payment business license. The name of the non-bank payment institution must indicate the word "payment". The minimum registered capital for the establishment of a non-bank payment institution shall be RMB 100 million, which shall be paid-in monetary capital. The shareholders of a non-bank payment institution shall make capital contributions from their own funds, and shall not make capital contributions from entrusted funds, debt funds or other non-owner funds.

- Improvement of payment business rules

The Regulations adapt to the needs of the development of payment business by classifying payment business into two categories, namely 1) stored value account operation and 2) payment transaction processing. The People's Bank of China is authorized to formulate specific rules. The new categorization is characterized by two features: first, it prevents regulatory gaps; second, it avoids regulatory arbitrage and promotes fair competition.

- The protection of the users' rights and interests

With regard to the protection of users' rights and interests, the Regulations stipulate that payment institutions shall draw up the terms of agreement in accordance with the principle of fairness and safeguard the users' right to know and choose. It protects the user's information and specifies the requirements related to information processing, confidentiality and sharing, and obtaining the user's consent. Payment institutions are required to clearly

indicate the prices of the services they provide and charge reasonable fees. In addition, the payment institutions shall fulfill the main responsibility of complaint handling.

- Increased penalties for serious violations of the law

With regard to increasing the penalties for serious violations, the Regulations make it clear that the People's Bank of China may impose fines on the relevant payment institutions, restrict part of their payment business or order them to suspend their business and rectify the violations, up to the point where the licenses to engage in the payment business can be revoked, among other punitive measures. At the same time, the directors, supervisors, executives and other personnel with direct responsibility can be penalized according to the specific circumstances, and if the circumstances are serious, market barring measures can also be taken.

- Conclusion

The Regulations significantly enhance the protection of the users' rights and interests, form stronger legal safeguards by comprehensively strengthening supervision, preventing and resolving risks, and responding to the key hot issues in the development of the industry. Most importantly, they offer clearer guidance for those who are interested in non-bank payment business.

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